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Supreme Court, U.S.
FILED
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No. 96-1412

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

HUBERT SPECKARD, Superintendent,
Groveland Correctional Facility,

Petitioner,

v.

STEVEN AYALA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 8, 1997

36 pp

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MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Steven Ayala, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari and to proceed in forma pauperis. Respondent has been granted leave to so proceed in all state court proceedings in this matter, in the United States District Court for the Southern District of New York, and in the United States Court of Appeals for the Second Circuit. Respondent's affidavit in support of this motion is attached hereto.

RICHARD M. GREENBERG, ESQ.

Affidavit

State of New York)
) ss.
County of New York)

I, Steven Ayala, being first duly sworn on oath, do depose and say as follows:

1. I am the Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty that I am unable to pay the costs of said case or to give security therefor; and I believe I am entitled to relief.

2. I am not currently employed, nor have I had permanent employment since I was incarcerated by the State of New York. My last employment was September 29, 1996. At that time, I received $200 per week, before taxes.

3. Within the last twelve months I have not received any money from any business or profession or self-employment, nor do I receive any interest, dividends, pensions, annuities, life insurance, gifts, inheritances, or other like source of income. I receive state unemployment compensation in the amount of $163 per week.

4. I have no checking or savings account. I possess minimal cash -- less than $20.

5. I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

6. I have one dependent, my five-month old son. I contribute $50 per week for his support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

Steven Ayala

Steven Ayala

SUBSCRIBED AND SWORN TO before me this 7th day of January 1997.

Richard M. Greenberg
Notary Public

My Commission expires:

RICHARD M. GREENBERG
Notary Public, State of New York
No. 31-4670365
Qualified in New York County
Commission Expires August 31, 1998

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the state's petition for a writ of certiorari should be denied where the United States Court of Appeals for the Second Circuit properly applied long-standing principles concerning an accused's right to a public trial and where the purported conflict between the Second Circuit and a prior decision of the New York Court of Appeals is likely to be resolved in cases currently pending before the New York Court of Appeals?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Steven Ayala respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Second Circuit's opinions in this case. Those opinions are reported at 89 F.3d 91 and 102 F.3d 649 (1996).

STATEMENT OF THE CASE

The Trial

On September 2, 1990, Steven Ayala allegedly sold ten dollars worth of cocaine to an undercover police officer, Willie Dotson. Dotson was involved in a "buy-and-bust operation," a one-time attempt to buy a single dose of drugs from a person who looks like he might be selling. Under this operation, if the undercover officer successfully makes a buy, he radios a description of the suspect to a nearby backup officer, who then approaches and, within minutes, makes an arrest. R.A. 17-18.[1] A buy-and-bust operation does not include any long-term investigation of any person or persons suspected of selling drugs. R.A. 17. Dotson -- whose real name was used freely by the prosecutor throughout Mr. Ayala's trial, including those portions that were conducted publicly, see, e.g. R.A. 20 -- had been involved in approximately two hundred buy-and-bust operations, just like this one, in only two years of undercover work. R.A. 18.

At Mr. Ayala's trial, conducted some ten months after his arrest, Dotson was the only person to identify Mr. Ayala as having sold drugs and was the state's key witness. Indeed, the prosecution's only other witness was the arresting officer from

---

[1]References to the State's Petition for Certiorari, the State's Appendix, and the Respondent's Appendix will be cited as "P.", "P.A.," and "R.A.," respectively.

the backup team. During the trial, the prosecution moved to have all spectators excluded from the courtroom during Dotson's testimony. P.A. 57-64. The state's request was based solely on the fact that Dotson was an active undercover officer, which, in the prosecutor's opinion, was "itself compelling reason for excluding the public from the courtroom," so that the court "didn't need any more reason to justify courtroom closure." P.A. 62.

The trial court conducted a brief hearing in which Dotson testified in support of the state's closure request. On the prosecutor's direct examination, which fills less than three transcript pages, Dotson testified that he had been working in the precinct where Mr. Ayala was arrested for approximately one month, and that he expected to continue working there for "[m]aybe six months, it depends." P.A. 58. Dotson also stated that he had previously been "approached" by people "who have attempted in some way to indicate to other people that [he was] a police officer," P.A. 59, and that there had been occasions where other undercover officers had been harmed when their identities were revealed. P.A. 59. Dotson did not suggest, however, that any such occurrence had resulted from his, or any officer's, having testified in open court. While Dotson asserted that he would fear for his life if he were recognized as a police officer, he did not link any such fear to testifying openly at Mr. Ayala's trial.

On cross-examination, Dotson testified that he was involved in only one long-term investigation in all of Bronx County, none in his own precinct. P.A. 60. He participated "almost exclusively" in short-term buy-and-busts. P.A. 60. During the week before trial, Dotson had made one undercover purchase at the location where Mr. Ayala was arrested. P.A. 60. The court asked Dotson how many purchases he had made in the last year in the general area of Mr. Ayala's arrest. Dotson estimated "[m]aybe twenty." P.A. 60. Dotson expected to return to that general area to make purchases in the future. P.A. 61.

Dotson readily admitted that he routinely sought to have the courtroom closed for his testimony in <u>every</u> case in which he was involved. P.A. 61. Dotson acknowledged that there was nothing about Mr. Ayala's case in particular that caused him any fear or apprehension about testifying. P.A. 61.

Over Mr. Ayala's objection, the trial court ordered that all spectators be excluded from the courtroom during Dotson's testimony. P.A. 63-64. The court based its ruling on the testimony that Dotson was working in the same precinct and expected to return to the same area in the future. P.A. 63-64. At no point in the record did the trial court consider alternatives to closing the courtroom nor did the court consider whether a narrower remedy than total closure would suffice. Thus, all spectators were precluded from attending the most critical portion of the trial.

On August 20, 1991, Mr. Ayala was convicted of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree, and criminal possession of a controlled substance in the fifth degree, see N.Y. Penal Law §§ 220.39(1), 220.16(1) & 220.06(5), and sentenced to six and one-half to thirteen years of imprisonment.

The State Court Appeal

On March 10, 1994, the Supreme Court of the State of New York, Appellate Division, First Department, affirmed Mr. Ayala's conviction. P.A. 54-55. On May 5, 1994, leave to appeal to the New York State Court of Appeals was denied. P.A. 56.

The Ruling on Habeas Corpus

On June 21, 1995, the United States District Court for the Southern District of New York denied Mr. Ayala's petition for a writ of habeas corpus. P.A. 45-53.

The Decisions of the Court of Appeals

On July 15, 1996, the Second Circuit applied the test set forth in Waller v. Georgia, 467 U.S. 39 (1984), and reversed and remanded with instructions to grant the writ: The prosecution failed to carry its burden to establish that an overriding state interest would have been prejudiced by Dotson's testimony in open court, and the trial court failed to consider reasonable

alternatives to complete closure of the courtroom during Dotson's testimony. Ayala v. Speckard, 89 F.3d 91, 95-96 (2d Cir. 1996) ("Ayala I").

The state filed a petition for rehearing with a suggestion for rehearing en banc. On December 11, 1996, the court granted the state's petition for rehearing and in a panel decision reaffirmed its original decision. Ayala v. Speckard, 102 F.3d 649, 650 (2d Cir. 1996) ("Ayala II") ("[W]e remain convinced that our initial opinion was correctly decided."). Contrary to the state's characterization in its petition for certiorari, see P. 9, the court expressly adhered to its earlier holding that the prosecution failed to establish that Dotson's safety would have been prejudiced by his testifying in open court. Ayala II, 102 F.3d at 652; see Okonkwo v. Lacy, 104 F.3d 21, 25 (2d Cir. 1997) (relying upon Ayala I's holding regarding first prong of Waller test).

In addition, the court amplified its discussion of the third Waller prong, holding that the trial court's failure to consider alternatives to complete closure deprived Mr. Ayala of his public trial right. The court initially observed that Waller itself suggests that the trial court must consider reasonable alternatives, even in the absence of a specific request. Ayala II, 102 F.3d at 653. Next, the court recognized that the Sixth Amendment is at least as protective of the right to a public trial as the First Amendment, see Waller, 467 U.S. at 46, and that under the First Amendment trial courts must always consider

less restrictive alternatives to complete closure. 102 F.3d at 653. Third, the court found the requirement to consider less restrictive alternatives implicit in Waller's directive that a courtroom closure be no broader than necessary. Id. Fourth, the court noted the existence of less restrictive alternatives. Id. at 653-54. Finally, the court, acknowledging that courtrooms are presumed to be open, see Waller, 467 U.S. at 45, concluded that if the party advocating full closure does not suggest reasonable alternatives, then the trial court itself should do so. 102 F.3d at 654.

The Second Circuit declined the state's sugg stion for rehearing en banc. On March 3, 1997, the state filed its petition for certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED LONG-STANDING PRINCIPLES CONCERNING AN ACCUSED'S RIGHT TO A PUBLIC TRIAL AND THE PURPORTED CONFLICT BETWEEN THE SECOND CIRCUIT AND A PRIOR DECISION OF THE NEW YORK COURT OF APPEALS IS LIKELY TO BE RESOLVED IN CASES CURRENTLY PENDING BEFORE THE NEW YORK COURT OF APPEALS.

This Court has emphasized that a defendant's right to a public trial requires courtrooms to be presumptively open, and that closure should be a rare and extreme event. Waller v. Georgia, 467 U.S. 39, 45 (1984); see Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982) ("the State's justification in denying access must be a weighty one"). The Sixth Amendment guarantee to a public trial is at least as strong as the First Amendment guarantee. Waller, 467 U.S. at 46 ("[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and the public."). Accordingly, this Court has applied the same standards for public trial claims under the Sixth Amendment as it has for claims under the First Amendment. Id. at 47-48 (adopting standards of Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) ("Press-Enterprise I")). See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7, 14-15 (1986) ("Press-Enterprise II").

Applying these longstanding principles and the specific guidelines set forth in Waller, the Second Circuit held that, in this unremarkable ten-dollar street-level alleged drug sale, the prosecution failed to carry its heavy burden to justify closure

of the courtroom during Dotson's testimony. The court first held that Dotson's testimony failed to establish that a compelling interest was likely to be prejudiced by his testifying openly at Mr. Ayala's trial. The court also held that the trial court's failure to consider reasonable alternatives to the complete exclusion of the public during Dotson's crucial testimony deprived Mr. Ayala of his right to a public trial.

Notwithstanding the Second Circuit's straightforward application of bedrock constitutional law, the state premises its petition for certiorari on a purported conflict between the Second Circuit and the New York Court of Appeals' decision in People v. Pearson, 82 N.Y.2d 436, 443-44, 602 N.Y.S.2d 932, 936 (1993),[2] as to whether a trial court must always consider reasonable alternatives before ordering full closure of the courtroom in a criminal case. See P. 11-17. The state's petition falters, however, on what it does not say. Prior to the state's filing its petition, the New York Court of Appeals granted leave to appeal in two separate cases specifically to reconsider its Pearson decision in view of the Second Circuit's decisions in this case.

On January 9, 1997 -- almost two months prior to the state's filing its petition for certiorari -- Judge George Bundy Smith granted leave to appeal in People v. Robert Ayala, ___ A.D.2d ___, 649 N.Y.S.2d 131 (1st Dept. 1996), appeal granted, ___

[2]Pearson was the companion case to People v. Martinez in the Court of Appeals, and the court decided the cases in a consolidated opinion.

N.Y.2d ___, ___ N.Y.S.2d ___ (Jan. 9, 1997), to revisit the Court of Appeals' decision in Pearson. See R.A. 22-23, 24 (Statement Pursuant to NYCA Rule 500.2 submitted by appellant in People v. Robert Ayala; Order Granting Leave to Appeal).[3] Additionally, the state cites People v. Nieves, ___ A.D.2d ___, 648 N.Y.S.2d 583 (1st Dept. 1996), as an example of a case in which an intermediate New York appellate court elected to follow the New York Court of Appeals' Pearson decision rather than the Second Circuit's decisions in this case. See P. 17. But the state fails to say that on February 4, 1997 -- one month prior to the state's filing its petition for certiorari -- Judge Joseph W. Bellacosa granted leave to appeal in that case to re-evaluate Pearson and to review the correctness of the intermediate appellate court's Nieves decision. See R.A. 25-26, 27 (Statement Pursuant to NYCA Rule 500.2 submitted by appellant in People v. Nieves; Order Granting Leave to Appeal).

Because the New York Court of Appeals has acted to address any differences it may have with the Second Circuit's decision in this case, the apparent conflict between the New York Court of Appeals and the Second Circuit may dissipate. If the conflict between the courts is soon resolved -- as it appears it will be -- there is no need for this Court to exercise its discretionary authority to resolve the conflict. Thus, this Court's certiorari

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[3]On information and belief the respondent in this action, Steven Ayala, is unrelated to Robert Ayala.

review, based on a putative state-federal conflict, is unnecessary or, at the very least, premature.[4]

Citing a decade-old Third Circuit case, the state inaccurately contends that there is also a conflict between the Second and Third Circuits on this issue. See P. 17-18. In United States v. Raffoul, 826 F.2d 218, 225 (3d Cir. 1987), the Third Circuit held that a newspaper seeking access to the defendant's trial testimony, over the state's and the defendant's objections, must suggest reasonable alternatives to closure of the courtroom. In so holding, the court relied exclusively upon Justice Powell's concurring opinion in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), which suggested that once the defendant seeking closure showed that fundamental fairness would likely be prejudiced by his testifying in open court, the defendant's right to a fair trial required the press to propose alternatives if it objected to closure. Id. at 401.

Nothing in Justice Powell's concurrence intimates that the defendant must make a showing of alternatives to protect his presumptive right to an open courtroom. Indeed, Justice Powell's subsequent opinion for the unanimous Court in Waller put to rest

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[4]Nor is there any merit to the state's suggestion that apparent disagreement among judges of the Second Circuit Court of Appeals warrants certiorari in this case. See P. 14-15, 18. Intra-circuit conflicts are an insufficient basis for granting a writ of certiorari because such differences can be settled through en banc proceedings or later panels' deference to the prior decision. E.g., Stern, Gressman, et al., Supreme Court Practice § 4.6, 177 (7th ed. 1993). Those are precisely the circumstances here. The Second Circuit declined the state's suggestion for rehearing en banc in this case and has subsequently followed Ayala.

the state's misimpression here that, in the face of the defendant's objection to secrecy, the court may disregard reasonable alternatives to complete closure. In Waller, the Court made clear that because courtrooms are presumptively open, the state carries the burden to justify closing the courtroom over the defendant's objection. 467 U.S. at 45-48. To enforce the accused's fundamental right to a free and public trial, Waller requires that the closure be no broader than necessary, and, consequently, that the court always consider reasonable alternatives to complete closure. Id. See Press-Enterprise II, 478 U.S. at 14 (trial court improperly failed to consider alternatives short of complete closure); Press-Enterprise I, 464 U.S. at 510 (proponent must show that closure is "narrowly tailored" to serve compelling interest likely to be prejudiced). Hence, the purported conflict with Raffoul is illusory, and the Second Circuit held, appropriately, that the state trial court denied Mr. Ayala's right to a public trial when it failed to consider whether there were any reasonable alternatives to complete closure.

Similarly, to justify closing a criminal proceeding to the public, the state was required to advance an overriding interest that was likely to be prejudiced. Waller, 467 U.S. at 48. To satisfy this standard, the state bore the burden of demonstrating not only an "overriding" or "compelling" interest that justified the exclusion of the public, but also a "substantial probability" that the asserted interest would have been prejudiced if the

proceeding were to remain open. Press-Enterprise II, 478 U.S. at 14.

As an afterthought to its contention that conflicting authority warrants review, the state criticizes the Second Circuit's conclusion that the prosecution failed to make out a substantial probability that Dotson's safety or cover would be at risk if he testified in open court. See P. 18-19. As a preliminary matter, the state's argument that certiorari is necessary on the ground that the court "improperly" applied First Amendment standards in a Sixth Amendment case ignores Waller's clear mandate that the same legal standards apply to Sixth Amendment cases as to First Amendment cases. 467 U.S. at 46.

Moreover, as noted above, the state's backup argument is equally flawed on the merits. The circumstances of this particular case presented no justification for closing the courtroom to the general public. As the Second Circuit carefully explained:

> Although Dotson testified that he was fearful for his safety should he be required to testify in open court, he did not state any particularized fear resulting from testifying at Ayala's trial. In fact, Dotson explicitly stated that there was nothing special about the trial that made him fearful. Nor did he suggest that anyone in a position to blow his cover was likely to be in the courtroom when he testified. Rather, Dotson expressly stated that he sought courtroom closure as a matter of course whenever he testified.

Ayala v. Speckard, 89 F.3d 91, 95 (2d Cir. 1996); see Ayala v. Speckard, 102 F.3d 649, 652 (2d Cir. 1996) (court "continue[s] to

disagree with" state's argument that Dotson's safety would have been exposed to substantial probability of prejudice).[5]

In short, the Second Circuit's conclusion that the prosecution failed to establish any probability -- let alone a "substantial one" -- that anyone observing Dotson's testimony in open court would threaten his safety or cover should he return to where Mr. Ayala was arrested, and that the trial court improperly failed to consider reasonable alternatives, was a straightforward, and correct, application of this Court's decisions in Waller, Press-Enterprise I, and Press-Enterprise II. Because the court's ruling was an unremarkable application of well established Supreme Court precedent, and because the New York Court of Appeals has recently taken steps to resolve its apparent conflict with the Second Circuit, this Court therefore should deny the state's petition for a writ of certiorari.

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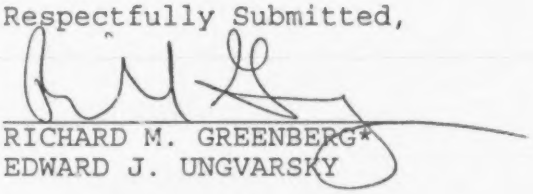
[5]The state argues that "[g]iven the many drug cases depending on the work of undercover officers," the Second Circuit's decision places future convictions "in grave peril" and "will be catastrophic to the administration of justice in New York." P. 17. The state's alarmist contention in this case -- resting on the hypothesis voiced by Dotson that the courtroom should always be closed in undercover drug cases -- is disingenuous. New York City stands alone as the only jurisdiction in the nation to reflexively close the courtroom in unexceptional street-level drug cases such as this one. All other jurisdictions, federal or state, large cities or tiny hamlets, follow the constitutional command, without any noticeable "catastrophic" effects, that closure is the exception and not the rule.

CONCLUSION

For these reasons, the state's petition for a writ of certiorari should be denied.

Respectfully Submitted,



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KARL E. PFLANZ

April 8, 1997

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: CRIMINAL TERM: PART 48

---------- INDICTMENT NO.

THE PEOPLE OF THE STATE OF NEW YORK 7667/90

-against-

STEVEN AYALA,

Defendant,

---------- VOLUME I.

851 Grand Concourse
Bronx, New York
July 15, 1991

B E F O R E: HONORABLE MARTIN MARCUS,

Justice and a jury.

A P P E A R A N C E S:

ROBERT T. JOHNSON, ESQ.,
District Attorney, Bronx County
BY: LISA DREZNICK, ESQ.,
Assistant District Attorney

MICHAEL BERARDINO, ESQ.,
Attorney for the Defendant.

FILED
JUN 19 1992
SUPREME COURT CLERK'S OFFICE
BRONX COUNTY

Michele Henley
Senior Court Reporter

I try to blend in with the way that they dress.

Q Thank you, Detective.

And are you familiar with the term buy operation?

A Yes, I am.

Q How many types of buy operations are there?

A Two.

Q Okay. And what types are there, please?

A There's short term buy operations and long term buy operations.

Q Now, first let me direct your attention to what is called the long term buy operation.

A Yes, Maam.

Q Can you please describe to the members of the Grand Jury exactly what that is?

A A long term--excuse me.

A long term buy operation is an operation by which it's done over extended periods of time. You make a buy, then you buy another time from this person or person that were involved.

Short--I'm sorry. That's it.

Q Okay. And you said the person involved, are they the same people that are involved with the long term?

A Yes, Ma'am.

Q Okay. Now, directing your attention to a short term

buy operation. Can you please define that for the members of the jury?

A Yes, Ma'am. A short term buy and bust is an operation--basically it's a buy and bust. You go to a vicinity in the--or a certain area and you buy from anyone that's selling there and, then, they are then arrested at the buy.

Q Okay. And these are one time encounters on the street?

A Yes, Ma'am.

Q Okay. Have you had occasion as an undercover police officer to work on buy operations?

Aa Yes.

Q And what type have you worked on?

A Short term.

Q Okay. And in a short term buy operation, can you please specify what your function has been as an undercover police officer?

A My function is to attempt to purchase narcotics from anyone that's selling narcotics.

Q Okay. And how many buys would you say you've made since June of 1989, when you bec[illegible] an undercover police officer?

A Two hundred or so.

Q

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX: CRIMINAL TERM: PART 48

THE PEOPLE OF THE STATE OF NEW YORK — INDICTMENT NO.

-against- — 7667/90

STEVEN AYALA,

Defendant,

VOLUME III

851 Grand Concourse
Bronx, New York
July 17, 1991

B E F O R E: HONORABLE MARTIN MARCUS,

J u s t i c e and a jury.

A P P E A R A N C E S:

ROBERT T. JOHNSON, ESQ.,
District Attorney, Bronx County
BY: LISA DREZNICK, ESQ.,
Assistant District Attorney

MICHAEL BERARDINO, ESQ.,
Attorney for the Defendant.

Michele Henley
Senior Court Reporter

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JUN 19 1992
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BRONX COUNTY

this case which require you to find the defendant not guilty.

Thank you very much.

THE COURT: Miss Dreznick.

MS. DREZNICK: Your Honor, ladies and gentlemen of the jury, Mr. Triplette and Mr. Berardino, I'd like to first begin by thanking you for your attention during this trial and for your listening closely to the evidence and the testimony that's been presented here.

I stand before you once again, no client next to me but as a representative of the citizens of Bronx County, as a representative of Robert T. Johnson, District Attorney of Bronx County.

We are at the point in the trial which is called the summations where I will have an opportunity to talk to you and I am greatful for this opportunity to do so.

During my summation I'm going to try to guide you through the testimony which you've heard and I'm going to be drawing some inferences, I'm going to be asking you to accept them.

Now, after being here the last three days

testimony, that you would look at their demeanor, that you would evaluate who has an interest in this case, who has an interest in the outcome of this case.

Well, I'm asking you to do so now, ladies and gentlemen. There were two witnesses that were called in here, Detective Willie Dotson and Police Officer Freddie Garcia.

I ask you to ask yourselves who has something to lose by a verdict of not guilty. I submit to you that these officers do not. Who has something to lose by the outcome of this case. I submit to you that these police officers do not, and who has an interest in the facts of this case, I submit to you the officers do not. They're not here today to find out what the outcome is, ladies and gentlemen, they're out on the street--

MR. BERARDINO: Objection, Your Honor.

THE COURT: Overruled.

MS. DREZNICK: Now, ladies and gentlemen, the police officers were cross examined and they were scrutinized by the defense but the police officers are not on trial at this time.

APPENDIX B

COURT OF APPEALS
STATE OF NEW YORK

----------X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondents, :

-against- : STATEMENT PURSUANT TO NYCA Rule 500.2

ROBERT AYALA, :

Defendant-Appellant. :

----------X

1. By permission of the Honorable George Bundy Smith, Associate Justice of the Court of Appeals granted on January 9, 1997, appeal is taken from an order of the Appellate Division, First Department, which affirmed with opinion a judgment entered on June 16, 1994 in Supreme Court, New York County, convicting appellant after trial of the crime of criminal sale of a controlled substance in the third degree, P.L. 220.39(1), and sentencing him to a prison term of 4½ to 9 years.
2. The indictment number in the trial court was 9521/93.
3. The order of the Appellate Division herein appealed was dated October 29, 1996.
4. The order and judgment appealed from were received by appellant on November 6, 1996. Service was by mail.
5. The Respondents on this appeal are represented by Hon. Robert Morgenthau District Attorney, New York County, One Hogan Place, New York, New York 10013.

6. The following issues are likely to be raised on appeal:

1. Whether the People made an insufficient showing, under the guidelines established by this Court in People v. Pearson, 82 N.Y.2d 436 (1993), to justify closure of the courtroom during appellant's trial where the undercover officer testified to no more than a general location of operation and to concerns for his safety that were unconnected in any way to his open court testimony in appellant's case. U.S. Const., Amend. VI; N.Y. Civil Rights Law, §12; N.Y. Judiciary law, §4.

2. Whether the legal standard for courtroom closure articulated by the court in Pearson remains viable in view of the Second Circuit's decision in Ayala v. Speckard, 89 F.3d 91 (2d Cir. 1996).

3. Whether where the Supreme Court in Waller v. Georgia, 467 U.S. 39 (1984), has stated that the trial court must consider reasonable alternatives to courtroom closure, defense counsel is not required to suggest alternatives in order to preserve the issue as a matter of law.

7. This Court has jurisdiction to entertain the appeal pursuant to C.P.L. §450.90(1).

APPENDIX C

State of New York
Court of Appeals

BEFORE: HON. GEORGE BUNDY SMITH, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ROBERT AYALA,

Appellant.

ORDER GRANTING LEAVE

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at Albany, New York
January 9, 1997

George Bundy Smith
Associate Judge

*Order of the Appellate Division, First Department, entered October 29, 1996, affirming a judgment of the Supreme Court, New York County, rendered June 16,1994.

*Description of Order:

APPENDIX D

COURT OF APPEALS
STATE OF NEW YORK

----------X

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent, :

-against- : STATEMENT PURSUANT TO NYCA RULE 500.2

MILTON NIEVES, :

Defendant-Appellant. :

----------X

1. By permission of the Honorable Joseph W. Bellacosa, Associate Judge of the Court of Appeals, granted on February 4, 1997, appeal is taken from an order of the Appellate Division, First Department, which affirmed a judgment of the Supreme Court, New York County, entered September 22, 1992, convicting appellant of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

2. The indictment number in the trial court was 674/92.

3. The order of the Appellate Division herein appealed was dated October 29, 1996.

4. The order appealed from was received by appellant on November 6, 1996. Service was by mail.

5. The Respondent on this appeal is represented by the Honorable Robert M. Morgenthau, District Attorney, New York County, One Hogan Place, New York, New York 10013.

6. The following issues are likely to be raised on appeal:

1. Whether, where defense counsel objected to the exclusion of his wife and

children from the courtroom, and the trial court itself admitted that they posed no danger to the undercover officer, the court violated appellant's right to a public trial when it nonetheless closed the courtroom to defendant's family and all spectators. U.S. Const. Amends. VI, XIV; Civil Rights Law § 12; Judiciary Law §4.

2. Whether appellant's exclusion from side bar colloquies during jury selection, where potential jurors were questioned about their familiarity with the crime scene and with appellant, violated his right to be present. C.P.L. §260.20; People v. Sloan, 79 N.Y.2d 386 (1992); U.S. Const. Amends., VI, XIV.

7. This Court has jurisdiction to review the issues listed above, pursuant to Criminal Procedure Law section 450.90(2)(a), because the Appellate Division's affirmance was on the law and the underlying issues were preserved by defense counsel's objections and the trial court's rulings to the contrary.

APPENDIX E

State of New York
Court of Appeals

BEFORE: HON. JOSEPH W. BELLACOSA, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

Milton Nieves,

Appellant.

ORDER GRANTING LEAVE

I, JOSEPH W. BELLACOSA, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at Albany, New York

February 4, 1997

Joseph W. Bellacosa

Associate Judge

*Description of Order: Order of the Appellate Division, First Department, entered October 29, 1996, affirming a judgment of the Supreme Court, New York County, rendered September 22, 1992.